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No. 90-1157

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In the Supreme Court of the United States

OCTOBER TERM, 1990

TODD PACIFIC SHIPYARDS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "time of injury" used to calculate a disability claimant's average weekly wage under Section 10 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 910, is the time of a traumatic accident or the subsequent time when the disability attributable to the accident becomes fully manifest.

2. Whether the administrative law judge's calculation of claimant's average weekly wage is adequately explained and supported by the record.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Director, OWCP (Morales) v. *General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985) 6, 11, 12
J.M. Martinac Shipbuilding v. *Director, OWCP*, 900 F.2d 180 (9th Cir. 1990) 11
Marathon Oil Co. v. *Lunsford*, 733 F.2d 1139 (5th Cir. 1984) 11
National Steel & Shipbuilding Co. v. *Bonner*, 600 F.2d 1288 (9th Cir. 1979) 13
O'Keeffe v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) 14
Stancil v. *Massey*, 436 F.2d 274 (D.C. Cir. 1970) 5, 6, 11
Todd Shipyard Corp. v. *Allan*, 666 F.2d 399 (9th Cir.), cert. denied, 459 U.S. 1034 (1982) 11
Todd Shipyards Corp. v. *Black*, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984) 5, 11
Walker v. *WMATA*, 793 F.2d 319 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987) 13

Statutes:

Act of Sept. 28, 1984, Pub. L. No. 98-426, 98 Stat. 1639:
§ 10(a)(2), 98 Stat. 1647 (33 U.S.C. 910(i)) 7
§ 28(a), 98 Stat. 1654 (33 U.S.C. 901 note) 7
Administrative Procedure Act, 5 U.S.C. 557(c) 12
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 3
§ 2(2), 33 U.S.C. 902(2) 8
§ 2(10), 33 U.S.C. 902(10) 7

Statutes—Continued: Page

§ 8, 33 U.S.C. 908 7
§ 10, 33 U.S.C. 910 ..... 4, 5, 6, 7, 11
§ 10(a), 33 U.S.C. 910(a) 13
§ 10(b), 33 U.S.C. 910(b) 13
§ 10(c), 33 U.S.C. 910(c) 13, 14
§ 10(i), 33 U.S.C. 910(i) 5, 7, 9, 10, 12
§ 13(a), 33 U.S.C. 913(a) 5, 11
§ 22, 33 U.S.C. 922 14

Miscellaneous:

H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1 (1983) 9
H.R. Rep. No. 1027, 98th Cong., 2d Sess. (1984) .. 9
R. Sloane, *Sloane-Dorland Annotated Medical-Legal Dictionary* (1987) 2
War Manpower Comm'n United States Employment Service, *Industrial Manning Table for Shipbuilding* (1942) 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C9) is reported at 911 F.2d 247; its order denying rehearing (Pet. App. D1) is unreported. The decisions of the administrative law judge (Pet. App. A1-A18) and the Benefits Review Board (Pet. App. B1-B6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. A petition for rehearing was denied on October 17, 1990 (Pet. App. D1). The

petition for a writ of certiorari was filed on January 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Todd Pacific Shipyards Corporation employed respondent Margaret L. Johnson as a ship "scaler" from June 17, 1979, until May 23, 1983.[1] Pet. App. A5, A7. Respondent suffered from pain and swelling in her hands both before and during her employment with Todd. Pet. App. A4-A8. On December 9, 1979, while on the job, she fell through a hole in the floor and injured her left arm and leg. Pet. App. A5, A7. After undergoing bilateral carpal tunnel release surgery[2] on her hands in early 1980, respondent strained her back on August 11, 1980. Pet. App. A5, A11. She again underwent surgery on her right thumb in 1981. Pet. App. A6. In 1982, two doctors evaluated her as having a 20% permanent impairment of function of her hands. Pet. App. A6-A7. Because of her medical problems, respondent's work was intermittent during most of the period from her 1979 hand injury until she stopped working completely in 1983. Pet. App. A5-A7.

On December 2, 1981, respondent filed compensation claims under the Longshore and Harbor Work-

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[1] A ship scaler is one who operates equipment "to loosen old paint and rust from metal surfaces of a ship to prepare the metal surfaces for repainting." War Manpower Comm'n, United States Employment Service, *Industrial Manning Table for Shipbuilding* 281 (1942).

[2] Carpal tunnel syndrome is a complex of symptoms resulting from compression of a nerve in the carpal tunnel, or lower arm and wrist. Carpal tunnel release surgery is designed to relieve pressure in the carpal tunnel. R. Sloane, *Sloane-Dorland Annotated Medical-Legal Dictionary* 689 (1987).

ers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, for both the 1979 fall and the 1980 back strain. Pet. App. A10. At a hearing before an administrative law judge, the parties stipulated that claimant's average weekly wage as of December 9, 1979 was $259.32, yielding a compensation rate of $172.80 per week; and that her average weekly wage as of August 11, 1980, was $519.19, yielding a compensation rate of $342.73. Pet. App. A2. Apparently neither party introduced evidence concerning her wages after August 11, 1980.

2. After reviewing the medical and vocational evidence, the ALJ concluded that respondent was permanently and totally disabled by tendonitis and arthritis in her hands. Pet. App. A15.[3] Finding that she also "suffered from bilateral carpal tunnel syndrome which, to a reasonable medical certainty was caused by both the fall and by merely using the hands on the job," the ALJ held petitioners responsible for the bilateral carpal tunnel syndrome even if respondent's fall and hand use at Todd merely aggravated a preexisting condition. Pet. App. A11. The ALJ further found that, even after the surgery to relieve her carpal tunnel syndrome, respondent continued to have a "bilateral permanent partial hand disability based on chronic tendonitis and arthritis aggravated by the on-the-job hand use" at Todd. *Ibid.*

With respect to the average weekly wage, the ALJ explained that "[t]he best evidence of [respondent's] average weekly wage before me is the stipulated $519.29 yielding a compensation rate of $342.73 per week. It reflects the parties[']] best estimation of [respondent's] * * * most recent [wage] earning ca-

[3] The ALJ found no ratable disability attributable to the back strain (Pet. App. A13), a finding that was not appealed.

pacity before said capacity was impaired by the condition of [her] hands." Pet. App. A15. Accordingly, for purposes of computing benefits, the ALJ adopted the sum that the parties had stipulated to be respondent's average weekly wage as of August 11, 1980. Pet. App. A2.

3. The Benefits Review Board affirmed all the ALJ's findings except the amount of the average weekly wage. Pet. App. B1-B5. On that point, the Board held that "the proper weekly wage upon which claimant's award should be based" was her stipulated average weekly wage "at the time of her hand injuries, *i.e.*, December 9, 1979," rather than the stipulated wage at the time of her alleged back injury, *i.e.*, August 11, 1980. Pet. App. B6.

4. The court of appeals reversed the order of the Board and reinstated the ALJ's determination of the appropriate average weekly wage. Pet. App. C1-C9. It viewed the "novel" issue in this case as "whether the victim of a traumatic accident should be compensated at the average weekly wage rate as of the time of the accident, or as of the subsequent time when the disability attributable to the injury became manifest." Pet. App. C3-C4. Under Section 10 of the LHWCA, 33 U.S.C. 910, the injured employee's average weekly wage "at the time of the injury" determines his or her compensation rate. Pet. App. C5. Relying on several earlier LHWCA decisions applying a "manifestation rule" to discern the time of injury under Section 10 and other provisions of the Act, the court held that the time of disability rather than the time of a traumatic accident is the "time of injury" within the meaning of Section 10. Pet. App. C5-C8. Assuming that respondent's injury was due to the delayed, disabling effects of the 1979 fall (Pet. App. C5), it thus upheld the ALJ's use of the

1983 onset date of permanent total disability as the time of injury in this case.

Among the decisions relied on by the court in reaching that conclusion (Pet. App. C5-C6) was *Todd Shipyards Corp.* v. *Black*, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984). In *Black*, the Ninth Circuit held that the time of manifestation rather than the time of exposure is the "time of injury" under Section 10 in a case of long-latency occupational disease such as asbestosis. While noting that Congress had codified *Black* in the 1984 amendments to the LHWCA by deeming the "time of injury" in occupational disease cases to be "the date on which the employee * * * becomes aware * * * of the relationship between the employment, the disease, and the * * * disability" (33 U.S.C. 910(i)), the court rejected Todd's argument that the reasoning of *Black* should be limited to occupational disease claims and not extended to traumatic injuries with delayed effects. Pet. App. C6. As the court explained (*ibid.*), although *Black* involved an occupational disease, "both its rationale and dicta indicate that its holding should apply to the manifestation of latent and unknown injuries as well."

The court also relied (Pet. App. C7-C8) on *Stancil* v. *Massey*, 436 F.2d 274 (D.C. Cir. 1970), which applied the same manifestation rule to determine the time of injury for purposes of the then-current version of the LHWCA's statute of limitations provision, 33 U.S.C. 913(a). Cf. note 5, *infra*. As the D.C. Circuit had observed in *Stancil*, an "accident" is the event causing the harm, while an "injury" refers to "the harmful physical * * * consequences of that event which need not occur or become obvious simultaneously with the event." Pet. App. C7-C8

(quoting 436 F.2d at 276). The court below thus agreed with the D.C. Circuit that the term "injury" "encompass[es] physical harm of a kind which is unknown to the employee at the time of the accident but which is later revealed, such as an occupational disease or a latent wound." Pet. App. C8 (quoting 436 F.2d at 277). The court emphasized that this interpretation also serves the purpose of Section 10 by compensating workers for loss of future—rather than past—earning capacity, and by encouraging injured workers to attempt to return to work. Pet. App. C8.

The court did not accept petitioner's argument that the ALJ erred in finding that $519.29 was petitioner's average weekly wage when she became permanently disabled in 1983, although the court's opinion did not address that issue specifically. See Pet. App. C8-C9 ("[W]e conclude that the Board should have approved the Administrative Law Judge's decision applying the time of the disability rather than the time of the accident to measure the amount of compensation.").

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. While the decision below appears to be in some tension with *Director, OWCP (Morales)* v. *General Dynamics Corp.*, 769 F.2d 66 (2d Cir. 1985), on the first question presented, neither the petitioners nor the court below recognized any conflict; *Morales* was

decided without any reference to the 1984 amendments to the LHWCA; and the two cases are distinguishable on their facts. Accordingly, further review is not warranted.

1. The LHWCA bases an injured employee's rate of compensation on the employee's average weekly wage "at the time of the injury."[4] 33 U.S.C. 910. In 1984, Congress amended the LWHCA by specifying that, for purposes of calculating the average weekly wage in claims "due to an occupational disease which does not immediately result in death or disability," the "time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." Act of Sept. 28, 1984, Pub. L. No. 98-426, § 10(a)(2), 98 Stat. 1647, codified at 33 U.S.C. 910(i). Congress expressly made this amendment applicable to claims pending on the date of enactment, September 28, 1984. § 28(a), 33 U.S.C. 901 note. The Act, however, does not further identify the "time of injury" in cases other than those involving an occupational disease within the meaning of Section 10(i).

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[4] Compensation is due for any "disability" (33 U.S.C. 908), which is defined to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10).

a. Although the court below did not specifically hold that the 1984 amendment controls this case, petitioner's condition is an "occupational disease" within the meaning of Section 10(i) and consequently falls within Section 10(i)'s manifestation rule. Petitioners assume (Pet. 6-8) that the amendment's reference to "occupational diseases" is limited to diseases caused by exposure to harmful substances or working conditions and does not include traumatic accidents. That assumption is incorrect: the provision speaks more broadly of "an occupational disease which does not immediately result in death or disability." 33 U.S.C. 910(i).

As the LHWCA's definition of "injury" makes clear, an "occupational disease which does not immediately result in death or disability" includes a degenerative condition that results from an accidental injury, like respondent's arthritis and tendonitis here. Section 2(2) of the LHWCA, 33 U.S.C. 902(2), broadly defines the term "injury" to include "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." 33 U.S.C. 902(2). That definition encompasses three different types of conditions. The first condition is an accidental injury whose effects are immediate, such as a severed limb or a burn ("accidental injury or death arising out of and in the course of employment"). The second is an accidental injury whose full effects are delayed, such as a fall or a blow followed by later degeneration of the affected body part ("such occupational disease or infection * * * as naturally or unavoidably results from such accidental injury"). The third condition

is an occupational disease caused by repeated exposure to harmful stimuli over time, such as asbestosis ("such occupational disease or infection as arises naturally out of such employment"). Notably, both the second and third conditions are denominated "occupational diseases." Because respondent's arthritis and tendonitis fall squarely within the second category—"occupational disease[s]" that result from accidental injuries—respondent's condition is an "occupational disease" that comes within the manifestation rule of the 1984 amendment.

The legislative history of the 1984 amendment reveals Congress's broad intent that "when compensation based on an occupational disease is awarded, the compensation benefits should be in an amount which is reasonable to the needs of the victim." H.R. Rep. No. 570, 98th Cong., 1st Sess. Pt. 1, at 12 (1983). The House Committee proposed a rule basing the "time of injury" in occupational disease cases on "the time of onset of the disabling condition." *Ibid.* In conference, the language was modified to define the "time of injury" as the time of awareness of the relationship between the employment, the disease, and the death or disability. H.R. Rep. No. 1027, 98th Cong., 2d Sess. 29 (1984); 33 U.S.C. 910(i). The conference report also specifically rejects the "date of last exposure to the injurious substance as the time of injury for determination of pay purposes." H.R. Rep. No. 1027, *supra*, at 29-30. Thus Congress plainly intended to set compensation levels in occupational disease cases at a dollar level commensurate to the employee's wage loss at the time disability becomes manifest. Nothing in the legislative history of Section 10(i) limits its applicability to those occupational diseases that arise naturally out of employment, but not out of accidental injury.

b. As an independent ground for application of Section 10(i), the facts of this case indicate that part of respondent's disability was due to a naturally occurring occupational disease—the third category of "injury" covered by the Act. As previously described, the ALJ found that respondent's hand condition was attributable *both* to the 1979 fall *and* to repeated hand use on the job (Pet. App. A11), and the court of appeals ascribed her injury to "the continued strain on her previous hand impairment" after the 1979 accident. Pet. App. C8. If the court had characterized respondent's hand condition as a "pure" occupational disease (carpal tunnel syndrome, arthritis, and tendonitis) caused only by her on-the-job hand use (repetitive motion trauma), the date of manifestation would plainly control under Section 10(i). There is no reason to define the "time of injury" differently here, where the disability resulted from *both* a traumatic injury with delayed effects *and* a chronic occupational disease caused or aggravated by repetitive hand use.

c. Even if respondent's condition did not come within the 1984 amendment's manifestation rule, nothing in that amendment or its legislative history reveals an intent to preclude application of a manifestation rule for conditions not encompassed within the terms of Section 10(i). The court of appeals therefore properly determined that respondent's injury—an accidental injury with delayed degenerative effects—should be treated in the same way that the Ninth Circuit had previously treated occupational diseases resulting from exposure to harmful substances or working conditions.

In *Black*, an asbestosis case, the court had held that the "time of injury" under the pre-amendment Section 10 of the Act was the time when the disability caused by the disease manifests itself. Although the

Black decision notes that "[i]n most cases of traumatic injury, the time of injury will coincide almost exactly with the time the worker is disabled" (717 F.2d at 1288), the decision also "foreshadows the problem that would arise in exceptional cases, like the one at bar, where the onset of disability occurs years after" a traumatic injury. Pet. App. C6. The result here, as in *Black*, compensates the injured worker based on the actual loss of income suffered at the time the worker becomes disabled. See also *Stancil* v. *Massey*, 436 F.2d at 276-278.[5]

d. In *Morales* v. *General Dynamics Corp.*, *supra*, decided soon after the 1984 amendments were enacted, the Second Circuit rejected a manifestation rule under Section 10 in a case where a traumatic injury led to degenerative post-traumatic arthritis several years later. Neither petitioners nor the court below identified *Morales* as inconsistent with the decision below, and indeed, *Morales* did not consider either the applicability or the remedial intent of the

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[5] The court of appeals also relied (Pet. App. C7) on several post-1972 cases concerning the interpretation of Section 13(a) of the LHWCA, 33 U.S.C. 913(a), the statute of limitations provision. See *J.M. Martinac Shipbuilding* v. *Director, OWCP*, 900 F.2d 180, 182 (9th Cir. 1990); *Marathon Oil Co.* v. *Lunsford*, 733 F.2d 1139, 1140 (5th Cir. 1984); *Todd Shipyards Corp.* v. *Allan*, 666 F.2d 399, 400-402 (9th Cir.), cert. denied, 459 U.S. 1034 (1982). In 1972, Congress had amended that provision to specify that "[t]he time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." In light of the amendment, which specifically employs a manifestation rule, the post-1972 cases do not appear to be on point.

1984 amendments.[6] It therefore cannot be concluded that, with the benefit of full consideration of the 1984 amendments, the *Morales* court would have disagreed with the conclusion reached by the Ninth Circuit in this case.

Morales also differs from this case because the *Morales* court found no evidence that the claimant's work continued to aggravate his knee condition after his original traumatic injury; the Second Circuit acknowledged that "[i]t has now been generally established that, where the increased risks of a particular employment aggravate a preexisting physical condition, the resultant disability may be treated as an occupational disease." 769 F.2d at 68. The Ninth Circuit's conclusion (Pet. App. C8) that in this case there *was* continuing work-related aggravation suggests that the Second Circuit would have agreed with the Ninth Circuit on the facts here.

For these reasons, any tension between *Morales* and the decision below does not warrant this Court's review.

2. Petitioners also argue (Pet. 8-9) that the ALJ's decision, upheld by the court of appeals, lacks any factual support and fails to explain its determination of respondent's average weekly wage, as required by the Administrative Procedure Act, 5 U.S.C. 557(c). Because the stipulations in the record concerned respondent's wages in 1979 and 1980, petitioners assert that they "could not provide a factual basis for determining [her] average weekly wage as of May

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[6] This failure is evidenced both by the lack of any explicit reference to the 1984 amendments, and by the court's assertion that "awareness" was "a factor introduced by Congress solely to extend the limitation period for the filing of claims." 769 F.2d at 68. That assertion was no longer true after Section 10(i) was added to the Act in 1984. See 33 U.S.C. 910(i).

19, 1983," which should have been based on earnings during the previous calendar year.

Petitioners' arguments are unpersuasive. Under the LHWCA, average weekly wages are to be calculated by one of three alternative methods, 33 U.S.C. 910(a), (b), and (c). The first two methods specifically refer to wages during the year immediately preceding the injury. Subsection (c), on the other hand, gives the factfinder more leeway to estimate the annual earning capacity of the injured employee in situations where subsections (a) and (b) cannot be applied.[7] It is used, for instance, when the employee's work is "inherently intermittent or discontinuous," or "when there is insufficient evidence with which to properly apply §§ 910(a) or (b)." *Walker* v. *WMATA*, 793 F.2d 319, 322 (D.C. Cir. 1986), cert. denied, 479 U.S. 1094 (1987); accord *National Steel & Shipbuilding Co.* v. *Bonner*, 600 F.2d 1288, 1291 (9th Cir. 1979).

In this case, the parties apparently introduced no evidence as to the wages either of respondent or of similarly situated employees during the year preceding May 19, 1983. Since there was thus no evi-

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[7] Subsection (c) provides (emphasis added):

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, *shall reasonably represent the annual earning capacity of the injured employee.*

dentiary basis for applying subsection (a) or (b), the ALJ relied on the best and most recent wage data in the record, as he is permitted to do under subsection (c). He also explained exactly what he had done, describing the stipulated average weekly wage of $519.29 as the "best evidence" before him, which reflected the parties' "best estimation" of respondent's most recent wage earning capacity before that capacity was impaired by her hand condition. Pet. App. A15. Although a more complete record might have permitted the ALJ to use a more recent or more accurate wage figure, any oversight by the parties or the ALJ in that regard does not warrant further review by this Court.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] We also note that the modification procedure in Section 22 of the Act, 33 U.S.C. 922, remains available to petitioners to correct any mistake in a determination of fact regarding respondent's average weekly wage. See generally *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

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